

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6098

**PETITION OF MARC AND MARIANNE DUFFY
OPINION OF THE BOARD**

(Hearings held November 16, 2005, January 11, 2006,
January 25, 2006, February 8, 2006, and June 7, 2006)

(Effective Date of Opinion: August 29, 2006)

Case No. A-6098 is a petition filed pursuant to Section 59-A-4.11(b) of the Montgomery County Zoning Ordinance (Chapter 59, Montgomery County Code, 1994, as amended) by Marc and Marianne Duffy (the "Petitioners") for three separate variances: a 6.9 foot variance from the established front building line of 32.30 feet, in accordance with section 59-C-1.323(a), for the construction of a new dwelling that is set back 25.40 feet from the front lot line; a 6.9 foot variance from the established front building line, in accordance with section 59-B-3.1, for the construction of a covered porch that is set back 16.4 feet from the front lot line; and a variance of two (2) feet for the construction of a new dwelling that is within five (5) feet of the side lot line where the required setback is seven (7) feet, in accordance with section 59-C-1.323(a).

The subject property is identified as Part of Lot 12, Block 1, Otterbourne Subdivision, and is located in the R-60 Zone at 3704 Thornapple Street, Chevy Chase, Maryland 20815, Tax Account No. 00527725 (the "Property").

Pursuant to Section 59-A-4.4 of the Zoning Ordinance, the Board held a public hearing on the petition. The original hearing spanned four days: November 16, 2005, January 11, 2006, January 25, 2006, and February 8, 2006. Martin J. Hutt, Esquire, represented Petitioners Marc and Marianne Duffy, both of whom appeared at the hearing. John Higgins appeared in support of the petition. Neighbor Mark Pirone appeared on his own and testified in support of the petition. The petition was opposed by several neighbors, including Michael Eig, Jane Mayer, Bill Hamilton, Kristin Gerlach, and Michael Shulman, who appeared at the hearing in opposition to the petition. The opposing neighbors (the "Opposition") were represented by David Brown, Esquire.

The proceedings were reopened by the Board at its May 17, 2006, Worksession to receive a revised building permit denial, dated April 11, 2006, which included a refigured established building line calculation of 27.10 feet. Because the revised established building line calculation changed the extent of the variance needed from the front lot line setback, and eliminated the need for a variance for the porch, the Board held an additional day of hearings on June 7, 2006, to consider the effect, if any, other than with respect to the magnitude of the variance(s) needed from the required front setback, of the revised established building line calculation on the uniqueness of the lot and on the Board's March 1, 2006 determination to deny the requested variances. Petitioners Marc and Marianne Duffy appeared pro se at the June 7, 2006 hearing. Respondent Michael Eig appeared on his own behalf and in a representative capacity on behalf of the Opposition.

Decision of the Board: Requested variances **denied**.

EVIDENCE PRESENTED TO THE BOARD

Preliminary Matters

As a preliminary matter, the Board notes that this matter arose out of determinations by the Department of Permitting Services (DPS) that Petitioners needed to obtain variances before the proper building permit(s) could be issued for their dwelling. The Board accepts as a starting point DPS' determinations that variances are needed, since those determinations were not challenged through the administrative appeal mechanism. Thus the only matter properly before the Board pertains to whether or not the requested variances should be granted under the criteria set forth in section 59-G-3.1 of the Zoning Ordinance. Although the Board allowed extensive testimony at the hearing regarding the circumstances that precipitated Petitioners' application for the desired variances, those circumstances are largely, if not wholly, irrelevant to the Board's grant or denial of the requested variances, although a brief history is provided below. In this regard, the Board notes that the correctness of any actions taken by DPS are not properly before this Board.

Counsel for the Opposition submitted a Motion to Dismiss, asserting that the Property fails to meet the uniqueness requirement set forth in section 59-G-3.1(a). The motion was denied since the uniqueness of the lot is something which Petitioners have the burden of proving, and the Board in fairness cannot make that determination without having heard the case.

Brief History

Petitioners purchased the subject Property, a three bedroom, two bath home, in May, 2004. They consulted with an architect and a builder, and had plans drawn up to put a 2-story addition on their rear of their house. They filed for a building permit in December, 2005. The County granted a building permit for the construction of the rear addition and the construction of a replacement garage on January 6, 2005 (building permit #368572, Exh. 22(f)). The addition was set back 7 feet from the west side lot line, and more than 7 feet from the east side line. This permit was posted, and there were no appeals. Construction began in February. In April, in order to connect the addition to the existing house, a dormer (approximately 22 feet wide) had to be removed from the rear of the house roof, at which point the inside of the roof became visible, and the defects and structural issues attendant to the existing roof were discovered. A second building permit was issued in April (building permit #381402, Exh. 22(h)), authorizing replacement of the existing (half story) second floor and roof with a full second story and a new roof. This permit also authorized the construction of a covered porch on the front of the house. The approved plans show that the second floor was to be built on top of and coextensive with the first floor of the original house, maintaining the existing 5 foot side setback on the western boundary. This permit was posted and again, there were no appeals. Construction proceeded. The roof and second floor walls of the original house were removed.

Petitioners testified that while reframing the first floor windows, their builder discovered extensive wood rot and mold growing on the first floor walls. They testified that their builder said this was a structural issue, and that the walls should be replaced. Petitioners testified that they called DPS to see if a permit was needed to replace the first floor walls, and that they were told that as long as the footprint of the original structure was not changed, no permit was needed. Petitioners testified that the first floor walls were then replaced on the existing foundation of the existing house, at the same height as the original walls (approximately 9 feet). Work proceeded on completion of the second floor, the roof, and the connection of the rear addition to the original house. Petitioners testified that the new roof was higher than the original roof, saying that previously (when the second story was a half story), the eaves had come down into the walls, but that now the roof was on top of full second story walls.

Petitioners testified that once the second floor was rebuilt and the roof replaced, they were informed by a County building inspector that a permit was needed to reframe the first floor exterior walls. Petitioners applied for that permit on June 9, 2005 (building permit #386666). Pursuant to a request from DPS, Petitioners filed for a single building permit to consolidate the approved permits (#s 368572 and 381402) and the requested permit for replacement of the first floor exterior walls (#386666).

Discussions ensued between DPS and the Petitioners' attorney regarding the correct side setback (5 feet or 7 feet). Petitioners testified that DPS initially advised them that the applicable side setback was 5 feet, but that DPS later determined that the applicable side yard setback was 7 feet because this lot was more than 40 feet wide. The exception in the 1928 Zoning Ordinance which allows a 5 foot side setback only pertains to lots having a width of forty (40) feet or less.¹ In late July, 2005, DPS issued a denial of the consolidated building permit application because of a need for a 2 foot side lot line variance for the second story addition, which was only 5 feet from the property line. Petitioners applied to the Board of Appeals for the necessary variance and were given a hearing date of October 19, 2005, which was expedited to September 28, 2005 at the request of the Petitioners. DPS called counsel for the Petitioners in September to inform him that counsel for the Opposition had raised questions with respect to the Established Building Line ("EBL"). In October, 2005, Petitioners were informed by DPS that an established building line of 32.3 feet applied, that a variance of 6.9 feet from the front lot line was required to allow their home to remain on its existing footprint, and that their proposed porch would need a variance of 6.9 feet as well. Petitioners amended their variance application, and this proceeding ensued.

The original EBL calculation of 32.3 feet was revised by DPS in its April 11, 2006 building permit denial. Although the revised EBL of 27.10 feet diminishes the amount of the variance needed from the front lot line setback (and per Petitioners, eliminates the need for a front lot line variance for the porch), it does not change the physical aspects of the Petitioner's lot which were previously entered into evidence and made part of the record. To the extent that there is additional evidence relative to the revised EBL calculation included in this Opinion, it is set forth in footnotes. All evidence related to and discussion of the original EBL calculation was considered by the Board in reaching its final determination on the requested variance from the applicable established building line setback as if it referred to the revised EBL.

EVIDENCE PRESENTED TO THE BOARD

¹ The 1928 Zoning Ordinance is made applicable to the subject property by Section 59-B-5.3 of the current Zoning Ordinance. Section III.C ("A' Residence Zone' `Area Regulations'") of the 1928 Zoning Ordinance (adopted March 6, 1928) sets forth the minimum dimensions for yards in the "A" Residence Zone, including the relevant side yard setbacks. Section III.C.3 provides that "In the "A" Residence Zone the minimum dimensions of yards and the minimum lot area per family, except as provided in Section VIII shall be as follows: ... 3. Side Yard: There shall be a side yard of not less than seven (7) feet in width on each side of a dwelling, except as provided in Section VIII." Section VIII.3 ("Height and Area Exceptions and General Regulations") of that Zoning Ordinance provides an exception for lots that are forty (40) feet or less in width, as follows: "Height and area requirements shall be subject to the following exceptions and regulations: ... 3. In the case of a lot or parcel of land having a width of forty (40) feet or less, and which is included in a plat of record at the time of the passage of this ordinance, there shall be a side yard on each side of a dwelling of not less than five (5) feet in width." See Exhibit 65.

1. The Property is a rectangular lot consisting of approximately 5,313² square feet. The Property is located on the south side of Thornapple Street, between Brookeville Road and Connecticut Avenue. The Property has 42.5 feet of frontage on Thornapple Street. The east and west side lot lines are each approximately 125 feet long, and, like the front lot line, the rear (southern) lot line is also 42.5 feet.

The lot was originally recorded by plat in 1894. The current configuration of this lot was created by deeds dated March 19, 1926 and August 27, 1926, pursuant to which this lot and the lot immediately to the east on Thornapple Street (Lot 12) were created as “twin lots,” each of which has 42.5 feet of frontage on Thornapple Street. See Exhibit 22(a).

2. The Property was originally improved with a one and one-half story home, set back 25.4 feet from the front lot line and five (5) feet from the western side lot line. The original home was built in 1923. The footprint of the original home was approximately 842 square feet.

3. Petitioner Marc Duffy testified that of the 42 properties along Thornapple Street between Brookeville Road and Connecticut Avenue, no lot is narrower than the subject Property, which is 42.5 feet wide, and the “twin” lot to the immediate east of the subject Property, which he testified is just as narrow as the subject Property.

Petitioner testified that at 5,311 square feet, his lot is substandard for the R-60 zone, and that except for the twin lot next door, there is no lot smaller than the subject Property on the three block stretch of Thornapple Street that runs between Brookeville Road and Connecticut Avenue. He clarified this statement on rebuttal, stating that the survey shows that his lot is actually smaller than its “twin,” and was in fact the smallest on the street. See Exhibit 4(b) (survey, showing the surveyed size of lot as 5,306 square feet). He testified that based on the State Department of Assessment and Taxation (SDAT) records, the size of the typical lot on Thornapple Street is 6,250 square feet, which he said is over 15% larger than the subject Property. See Exhibit 34. He testified that all of the other properties on their block are significantly larger. He testified that if you were considering the lots on both Thornapple and Underwood Streets (one block north of and running parallel to Thornapple), there is one lot at 6607 Dalkeith Street, which runs between Underwood and Thornapple Streets (Part Lot 9, Block 2) and which, at 5,009 square feet, is smaller than his Property and its twin, but said that that lot is 50 feet wide. He also said that there were two smaller lots at the corner of Underwood Street and Brookeville Road (lots 19 and 20 (3601 and 3603 Underwood), which are 5,255 and 5,087 square feet respectively), but that both of those lots were wider than the subject Property.

² Mr. Duffy testified that his lot and the lot immediately to the east were each 5,311 square feet. Exhibit 4(b), the survey, shows the record size of the lot as 5,313 square feet and the survey size as 5,306 square feet.

Petitioner's counsel then asked that the relevant neighborhood be restricted to the three block stretch along Thornapple Street that runs between Brookeville Road and Connecticut Avenue.³

Petitioner testified that Florida Street dead ends at the rear of his Property, and that there is a storm drain inlet located there, 15 feet from his rear property line. Petitioner testified that he examined the storm drain with a licensed plumber. He described a manhole with a catch basin below, then 15 feet of terra cotta pipe running towards his property line. He testified that the pipe is full of debris, and that it has cracks approximately 2 inches in length. He said that the pipe turns right at his property line and runs parallel to his property. He presented evidence indicating that this storm drain is not maintained by Montgomery County Department of Public Works and Transportation, not maintained by the Washington Suburban Sanitary Commission, and not maintained Chevy Chase, Section 3, but rather that the drain is a private drainage system and is considered abandoned. See Exhibit 36 (engineer's report, with survey showing location of storm drain, letter from plumber regarding the condition of the drain, and letter from Section 3 Town Manager). See also Exhibits 37(a), (b) and (c) (letter from Bethesda Plumbing and Heating regarding condition of storm drain, letter from WSSC saying they haven't maintained the drain since the late 1960's, and letter from the Montgomery County DPWT advising that the drain is part of a private drainage system and that the County does not maintain it), and Exhibits 41(g), (h), and (i).

Petitioner stated that the storm drain starts in the right of way and then runs along the property line between his Property and the neighbor's Property at 7106 Fulton Street, thus crossing onto private property. He stated that as far as he is aware, there is no easement for a storm drain in his land records, and that he had asked appropriate public officials if there was an easement for a storm drain along his Property or the Fulton Street property, and that they could find no recorded easements for the storm drain.

Petitioner testified his Property is uniquely impacted by the established building line calculation because his house was built in 1923 at a distance of 25.4 feet from the front lot line. He testified that his house was built closer to the front lot line than any of the homes used in determining the EBL for his Property, and that the EBL thus disproportionately impacts his Property. He stated that if you include the distance of the porches and steps on surrounding properties, several of these properties have structures that extend closer to the front lot line than do those on his Property. He stated that he was seeking a variance from the application of the EBL so that he could rebuild his house on the existing foundation. He stated that he was also seeking an EBL variance for construction of a front porch, and said that the house as it previously existed had a six and one half foot stoop to allow access to the front door. Petitioner testified that his neighbors to the east and west both have front porches and steps that extend 13

³ The Opposition did not challenge Petitioner's choice of relevant neighborhood.

feet from the foundation wall, and that the house at 3612 has an 8.4 foot porch with one foot of stairs. See Exhibit 38 (EBL survey showing the distances from the foundation walls of 3612 to 3714 Thornapple to their front property lines, including porch dimensions).⁴

As an aside, Petitioner testified that at looking at the EBL survey, which is to scale, one can see that the houses at 3612, 3614, 3706, and 3708 all appear to be built five feet or less from the side property line.

Petitioner further testified that the EBL survey contains the elevations for Thornapple Street, and demonstrates that the street slopes from the west to the east (high to low), stating that his Property at 3704 Thornapple is at a lower elevation than the property at 3706 (to the immediate west), which in turn is lower than the property to the west of that, at 3708. He stated that the properties at 3706 and 3708 are the only two properties on Thornapple Street which have pools in their back yards, making his Property unique because it is the only Property along the relevant stretch of Thornapple Street which is bounded by two pools to the immediate west. He testified that the pools and the patios surrounding them create large impermeable surfaces, causing surface water runoff that flows towards his Property because of the slope along this section of Thornapple Street. He presented pictures of the water flow and ponding in his rear yard caused by the rain of February 3, 2006.⁵ See Exhibit 56.

4. Petitioner Marc Duffy also testified regarding the practical difficulties and exceptional or undue hardship that strict application of the Zoning Ordinance would impose on his Property.

With respect to compliance with the side line setback, Petitioner testified that they had three alternatives: they could either move the house two feet to the east, cut two feet off of the existing house, or tear the house down and rebuild it. He testified that the total encroachment on the side of the house, if a variance were granted to allow the home to remain with a five foot setback instead of complying with the required seven foot setback, would be 64 square feet (two feet x 32 feet (depth of original footprint)). He stated that moving the house two feet to the east would cause them to lose use of their driveway and would

⁴ As a result of discussions at the original hearing which indicated that porches and steps were not always excluded from an EBL calculation, and given that Petitioners' surveyor had measured all of the distances used in Petitioner's EBL calculation to the foundations of the surrounding homes, Petitioner Marc Duffy testified at the June 7, 2006 hearing that he had determined that their original EBL calculation of 32.30 feet may have been done incorrectly. Petitioner testified that he asked his surveyor to revise the original survey to include measurements from the front line to front porches and steps. See Exhibit 76. Petitioners then took this revised survey information to DPS, and on April 11, 2006, were issued a revised building permit denial with an EBL of 27.10 feet. Although the evidence presented in this case discusses a 6.9 foot variance from the original EBL of 32.30 feet, the Board accepts DPS' April 11, 2006, determination that the variance needed is in fact 1.70 feet from the corrected EBL of 27.10 feet.

⁵ Later testimony indicated that the rainfall that day was .83 inches, which does not even constitute a "one-year" storm (in other words, this was a rain event that could be expected to take place more than one time per year).

prevent access to the garage (for which they have a lawful building permit—the old garage has been demolished). He testified on rebuttal that thirty of the houses along the relevant stretch of Thornapple Street have garages, and that only three do not have driveways.

With respect to the variance of 6.9 feet from the application of the established building line,⁶ necessary to allow the house to remain on the 1923 foundation, Petitioner testified that in order to comply with the EBL, he would either have to move the existing house back 6.9 feet, or would have to cut off the existing front of the house. He stated that in connection with moving the house, they would have the practical difficulty of demolishing the 1923 foundation, building a new foundation on all four sides, removing the roof again, and tearing down their lawfully constructed rear addition.⁷

With respect to the variance from the application of the EBL to allow construction of a roofed but unenclosed porch, Petitioner testified that the Zoning Ordinance permits such porches to extend nine feet beyond the front setback (in this case, EBL).⁸ He testified that because their house was sited 25.4 feet from the streetline, in front of the EBL, then assuming the house stays where it is, it is his understanding that without a variance his porch could extend only 2.1 feet from the front of the house. He stated that the plans they had filed with DPS showed a seven foot porch with two feet of steps, thus extending nine feet from the front of their house. He testified that most of the houses on Thornapple Street have roofed porches and not covered stoops, and that they choose a seven foot porch because it was comparable in size to other porches on the street. He said that of the 42 houses on the relevant stretch of Thornapple Street, 21 are two-story houses with porches.

⁶ Pursuant to the May 17, 2006, admission into the record of the April 11, 2006 building permit denial, with its revised EBL calculation, all earlier evidence and testimony specifically related to the need for a 6.9 foot variance from the otherwise applicable EBL of 32.30 feet was deemed by the Board in its consideration of this matter after admission of this new evidence to refer more generally to the need for relief from the applicable EBL, and more specifically to the need for relief from the revised EBL (27.10 feet). See Exhibits 67(a) and 76.

⁷ At the June 7, 2006 hearing, Petitioner Marianne Duffy introduced eight (8) recent Board decisions into the record, which she argued showed that an EBL calculation can create a hardship. The Board noted in the hearing that it evaluates variances on the basis of facts unique to each case. Accordingly, a prior variance opinion does not constitute “precedent” for subsequent variance cases. The Board distinguished one case Mrs. Duffy mentioned as dealing with a corner lot that had to meet two established building line setbacks, and reminded Petitioner that the facts of each case are different, and that the Board was focused on the facts of the case at hand. The cases are in the record at Exhibits 78(a) through (h).

⁸ The Board notes that this is not wholly correct. Section 59-B-3.1(d) of the Zoning Ordinance permits a front porch to extend a maximum of 9 feet from the face of the house if any part of the porch extends into the front setback: “Roofed, but not enclosed, porches may extend into the minimum required front or rear yard not more than 9 feet, including the roof. If any portion of a roofed but not enclosed, porch extends into the required minimum front yard, the porch and its roof may extend not more than 9 feet from the face of the building parallel to the front lot line.” Thus the only way that a porch could extend the full 9 feet into the setback would be if the face of the house were on the setback/EBL line.

On rebuttal, he testified that the EBL disproportionately impacts their property because the original house was incongruently sited on the lot, and that five of nine houses used to determine the EBL do not meet the EBL. In addition, he testified that those five houses have (front) porches that encroach more than nine feet into the EBL. He further testified that the 3713 Thornapple has a porch which extends to 19.3 feet, that the Mayer-Hamilton's porch is at 20.8 feet, and that the Gerlach's porch is at 20 feet, all of which he asserts are several feet beyond his house (but not his porch). He stated that while Ms. Eig's letter indicates that their (the Duffy's) porch noticeably projected beyond her house, Mr. Duffy contends that all of these porches extend beyond her house as well. He stated that of the six houses with full front porches that were used to calculate the EBL, the Duffy's house projects beyond only one of those porches, contrary to assertions made by Ms. Eig. He stated that the porch on the Gerlach house extends more than five feet beyond their east side neighbor, and that the porch at 3713 extends over seven feet beyond both neighbors.

5. Petitioner Marc Duffy testified that in his opinion, the granting of the variances was the minimum reasonably necessary to overcome the aforesaid exceptional conditions. He stated that he did not think the requested variances would create a substantial impairment to the intent, purpose and integrity of the Master Plan or any other duly adopted and approved area master plan affecting his Property or surrounding properties. He stated that the grant of the requested variances would continue the residential nature and use of their Property, and would bring it into character with the surrounding properties. He stated that at least seven houses on Thornapple Street have been granted variances, and that in his opinion, that demonstrates the eclectic mix of housing on the street.

6. Petitioner Marc Duffy testified that in his opinion, the grant of the variances would not affect the use and enjoyment of neighboring properties, stating that the Petitioners had actually sought to increase privacy for adjoining neighbors by moving windows in the addition and removing a window on the west side of their home, thereby minimizing the impact of windows on the west side. He testified that he felt that moving the house back would in fact have a greater impact on the west side neighbors because the Petitioners' house would extend beyond the west side neighbors' house, and would look down into their pool. He stated that their west side neighbors are the only adjoining neighbors to oppose the variance request, and that the owners of all three of the other adjoining properties have written letters in support of Petitioners' variance request. See Exhibit 20. He stated on rebuttal that at least 17 neighbors on Thornapple Street had written in support of their requested variances (including the three previously mentioned)(over 30 neighbors total), and that despite active solicitation of opposition, no residents other than those appearing at the hearing had written to oppose the variances.

Petitioner stated that in his opinion, the addition of a covered porch on the front of their house would increase the value of other homes on the street, as

evidenced by other homes with porches on the street. He stated that none of the neighbors to the west could see Petitioners' house or porch because of year round trees and shrubbery. He said that his porch would extend only four feet beyond the porch of his neighbor to the east, and that again, she had written in support of the requested variances. He reiterated that the front and sideline variances necessary to allow the existing foundation to remain where it has been since 1923 would simply maintain the status quo. Thus he concluded that the variances sought would not be detrimental to the use and enjoyment of neighboring properties.

On rebuttal, Petitioner added his sentiment that the nonuniform character of the development along Thornapple Street, as well as the large number of houses with porches, supports his contention that the grant of the variances from the EBL setback would not be detrimental to the use and enjoyment of neighboring properties.

7. Petitioners testified that they obtained a revision to their original building permit to alter the configuration of the second floor after they discovered structural damage under the roof. See Exhibit 50. The Petitioners attempted to obtain a second revision after demolishing the first floor walls. Petitioner Marianne Duffy testified that the DPS structural reviewer advised her that he could not complete the structural review for a renovation, since the removal of the first floor walls made it necessary for Petitioners to apply for a permit for new construction. Mrs. Duffy testified that she then spoke with Susan Scala-Demby and Delvin Daniels, who told her that because she had replaced more than 50% of her exterior wall framing, her house was considered a new house, and that new houses are required to have a seven foot side yard setback. DPS issued Petitioners a building permit denial, which formed the basis of this variance application.

8. Mr. John Higgins testified as a witness on behalf of the Petitioners. He stated that he has lived in his house on Dalkeith Street for 35 years,⁹ and that he is a neighbor to all of the parties.

Mr. Higgins testified that when he first heard about the Duffy's situation, he had come to Rockville to read the file, and that he had then written to his neighbors to express his views on that situation. See Exhibit 39(c). He said that a number of neighbors had approached him to say they agreed with what he said in his letter. He stated that in his opinion, the grant of the requested variances would not adversely affect the community in any way. He stated that in this three block stretch of Thornapple Street, there are myriad architectural styles. He said there are big houses, small houses, and medium houses. He testified about a small house that had been torn down to make room for a "mansionization" project right next door to a rental. He stated that as shown on the plans, the Duffy

⁹ Mr. Higgins' property is the property previously identified as the smallest property in the area, at 5,009 square feet.

project is in no way a mansionization project. He testified that in his opinion, the Duffy house, if completed, will add to the beauty of the street and the community overall. He said that there really is no architectural theme to Thornapple Street, nor does he feel there is any consistency with respect to side lot lines, stating that many houses are very close to the property lines and each other. He indicated that the existing proximity of the houses to one another further evidences that the approval of the Duffy variance would not be at all inconsistent with the general atmosphere of the street.

9. Mr. Mark Pirone, who lives directly across the street from the Duffys at 3703 Thornapple Street, voluntarily appeared and testified that he and his wife Suzanne support the grant of the Duffys' requested variances. He testified that next to the Duffys themselves, he feels that he and his wife have the most at stake in this case, since their front windows and front yard look out on to the subject Property.

10. Mr. Gregory McClain, Permitting Services Specialist for DPS, and Ms. Susan Scala-Demby, Permitting Services Manager for Zoning at DPS, testified for DPS. Mr. McClain testified that he reviewed this building permit application.¹⁰ He testified that the Property requires a seven foot side setback. He testified that in determining which zoning criteria apply to a property, he determines the zoning of the property, determines the condition of the property, and determines whether or not it meets current dimensional standards (lot width and lot size). He then determines when the lot was subdivided or platted to ascertain which development standards apply.

In response to a Board question regarding where the dividing line is between a permit for a renovation and a permit for new construction, Mr. McClain testified that what the applicant should have done or should have tried to do was to retain 50 percent of the exterior walls above the first floor.¹¹ Ms. Scala-Demby stated that the DPS website contains guidance regarding what constitutes new construction.

Mr. McClain testified that he recalled talking to Mrs. Duffy, and that while he remembers the urgency and her desire to get the project done, he does not recall the specifics. He stated that he works the zoning counter and sees a lot of people during the course of the day and during the course of the week. Ms. Scala-Demby testified that her staff, including Robin Ferro, Delvin Daniels, and Gregory McClain, are permitted to respond to inquiries regarding zoning standards and what might or might not be permitted, and that all are Zoning Specialists. She testified that other staff at DPS is not necessarily authorized to give zoning information.

¹⁰ It was later clarified that he had reviewed the April and June permit applications.

¹¹ Ms. Scala-Demby clarified that the requirement is that 50 percent of the exterior walls above the "finished first floor" must remain as exterior walls.

Ms. Scala-Demby testified that she recalled meeting with Mrs. Duffy and Delvin Daniels after Mrs. Duffy found out she needed a new construction permit. She said that they gave Mrs. Duffy instructions about what she needed to do to obtain a building permit.

Ms. Scala-Demby agreed with Board comments that because this Property was recorded before 1928, under section 59-B-5.3 of the Zoning Ordinance, the dwelling on the Property could be altered, renovated, enlarged, or replaced in accordance with the development standards set forth in the 1928 Zoning Ordinance.¹² She testified that per the 1928 Zoning Ordinance, a lot that was 40 feet or less in width was accorded a five (5) foot side setback, and that the remainder were subject to a seven (7) foot side setback. She stated that the minimum lot width for the zone at the time was 50 feet. She testified that DPS has interpreted the 1928 Zoning Ordinance as imposing a seven (7) foot side setback on lots between 40 and 50 feet in width because the exemption for the five (5) foot side setback specifically states that it is applicable to lots 40 feet or less in width.

11. Ms. Susan Scala-Demby testified, in response to questioning, that the first building permit, for the rear two-story addition, was filed in December 2004 or January 2005. She said the applicable development standards were set forth in the 1928 Zoning Ordinance (Ordinance No. 1, adopted March 6, 1928), in section III.C.1 (minimum area: 5,000 square feet; minimum width at front building line: 50 feet); section III.C.3 (side yard setback: 7 feet); and section VIII.3 (if width is 40 feet or less, side yard setback: 5 feet). See Exhibit 65. She testified that since this lot did not have a width of 40 feet or less, DPS went to the "A" residence section of the 1928 Zoning Ordinance for the applicable side setback (per section III.C.3, 7 feet). She testified that permit number 368572 was issued on January 6, 2005, for construction of a rear two-story addition, and that that permit required a seven (7) foot setback. See Exhibit 22(f).

Ms. Scala-Demby testified that permit number 381402 was requested and issued in April, 2005, granting permission to remove (and replace) the existing second story of the Duffy house, to add a new roof, and to construct a front porch with steps. See Exhibits 22(h) and (i). She testified that that permit allowed a five (5) foot side setback for the existing home, saying that she thought the rationale must have been that because the new second story was not extending any further into the setback than the existing structure, it was permissible to go to five feet. She also stated that she did not believe DPS had looked at the side setback very carefully. She testified that permit number 381402 would not expand the existing footprint of the house into the side yard.¹³ She said that the

¹² Ms. Scala-Demby also testified that DPS had determined that planned subdivision was not required for a building permit to be issued based on section 59-B-5.3, which says that the lot had to be recorded by subdivision plat or deed before June 1, 1958.

¹³ Ms. Scala-Demby testified on cross examination that the addition of a front porch is not considered an expansion of the existing footprint if it does not extend more than nine (9) feet into the setback.

building plans submitted in connection with this permit application show a new front porch, the new addition in the back, and a new second floor.¹⁴ See Exhibit 50(g). She said the plans also show a new roof. On redirect, she confirmed her earlier testimony, agreeing that DPS, in approving the permit, clearly understood that it was for the purpose of removing the existing second story, replacing it with a new second story, and adding a roof.

Ms. Scala-Demby testified that she recalled requesting that the Duffys file an application for a new building permit to consolidate the permits for their rear addition (January), their second floor, new roof, and porch (April), and the replacement of their exterior walls (June). See Exhibit 46. She testified that the Duffys filed for this permit on June 23, 2005, and that it was given permit number 388422. See Exhibit 47. She testified that this was the first permit application on which the description of the construction is shown as “new construction.”¹⁵ She stated that after the application was filed, DPS lifted the stop work order and the Duffys were allowed to continue with their construction, including replacement of the first floor walls.

Ms. Scala-Demby then testified that when DPS realized that their advice regarding the five (5) foot setback was incorrect because the property was 42.5 feet wide and therefore not eligible for a reduction in the side yard setback under the 1928 Zoning Ordinance, the county issued a second stop work order. She testified that the stop work order likely followed DPS’ denial of permit 388422 (consolidated building permit). See Exhibit 22(k). She further testified that she advised the Duffys that the permit issued in April, which allowed the new roof and second floor to be constructed with a five (5) foot setback from the side property line, had been issued in error.

Ms. Scala-Demby testified that she was subsequently contacted by members of the community and/or their counsel, who asked if DPS had requested information to determine if there was an established building line requirement in the neighborhood. She testified that she then asked the Duffys to provide this information, which she said they promptly provided. She testified that it is standard practice for DPS to request this information, but that DPS had not requested any information from the Duffys regarding the established building line in connection with their January, April, or June permit applications.¹⁶ In

¹⁴ At the hearing there was discussion as to whether or not the second floor plans clearly showed which walls were to remain and which were to be demolished.

¹⁵ Permit application 386666, filed on June 9, 2005, described the desired construction as an “alternation.” Ms. Scala-Demby agreed, in response to questioning, that this permit covered “alteration to a single family dwelling, replace[ment of] the first floor exterior walls.”

¹⁶ On cross examination, Ms. Scala-Demby acknowledged that the site plans submitted in connection with the January and April building permits did not specify the distance the house was set back from the street. While she stated that the first permit was for a rear addition, and so would not raise an EBL issue, she acknowledged that DPS should have asked for the front setbacks in connection with the second permit. On redirect, Ms. Scala-Demby testified that the site plans submitted with both the January and April applications were scaled, and that the zoning specialists who reviewed them would have requested additional information from the applicant if the submitted plan was not adequate to allow him or her to

addition, she testified that in October, 2005, DPS had advised the Duffys of a new requirement, related to the established building line, which affected their porch.

Ms. Scala-Demby testified that Zoning Interpretation Policy ZP 0404-2 was intended to clarify for the public what the Established Building Line was, and that this Policy was applied in this case. See Exhibit 48.¹⁷

Ms. Scala-Demby testified that the elevations submitted in connection with a building permit application are typically the most relevant documents reviewed by her staff. She testified that her staff will look at floor plans, but that they don't typically look at what are new walls versus old or existing walls. She stated that a determination of whether or not the amount of exterior wall to be removed constitutes a renovation or new construction was typically done by her staff (zoning). She also said that when the building inspectors review the plans, they will sometimes ask the zoning staff questions regarding whether or not this should have been considered new construction.

12. Mr. John McFadden testified on behalf of the Petitioners. He was accepted as an expert in the field of civil engineering. He testified that he was retained by the Duffys to assess the potential impact of moving the Duffy's home on the drainage at the subject Property. He testified that he focused his efforts on three major points: first, to assess the existing drainage conditions at the subject Property; second, based on this assessment, to determine the impact that moving the house to meet the setback requirements would have on drainage; and finally, based on the results of the first two inquiries, to determine what, if anything, would make this property unique with respect to drainage. He testified that there were four factors which, when taken together, serve to make this Property unique.

Topography – Change in Grade and the “Parking Lot” Effect

Mr. McFadden testified that he used the contour lines on the zoning vicinity map to conclude that along the western edge of the subject Property, you

evaluate the application for compliance with the zoning standards. Mr. Duffy later cited to Exhibit 22(c) in testifying that in connection with the January building permit, the Duffys had provided the County with a 1991 survey which calls out the distance the house is set back from the front line.

¹⁷ Ms. Scala-Demby testified at the June 7, 2006, hearing that Exhibit 76 (revised survey/EBL calculation) had been submitted to and reviewed by DPS. She stated that the revised established building line was determined in accordance with DPS Zoning Interpretation Policy ZP 0404-2. Ms. Scala-Demby testified that for purposes of calculating an established building line, one should measure the distance from the front property line to the front of any front porch and steps if, taken together, the two extend more than nine (9) feet from the face of the house. In response to a question from Board Chair Fultz, Ms. Scala-Demby testified that Exhibit 76 conforms to DPS guidelines for calculating established building lines in that it took into account those porches (and steps) that should have been included. The Board notes that while DPS Zoning Interpretation Policy ZP 0404-2 offers the DPS interpretation of Section 59-A-5.33 of the Zoning Ordinance, it is the Zoning Ordinance itself, and not DPS' interpretation of the Zoning Ordinance, which is controlling.

have a steep downgrade entering a flatter downgrade, going from a 4 percent grade (a drop of 4 feet over a lateral distance of 100 feet) to a 2.2 percent grade (a drop of 2.2 feet over a lateral distance of 100 feet). He testified that the water flowing down this 4 percent slope has to transition to a 2.2 percent slope, causing a back up of water or “parking lot” effect as the rate of flow slows. Mr. McFadden testified that he visited the Property the day after a rainfall of .55 inches. He testified that he examined the swale that runs behind 3704, 3706 and 3708 Thornapple Street, and that he observed ponding in the swale, starting at 3704 and working its way back to 3706. He testified that his observations were consistent with the “parking lot” effect he had predicted based on the change in slope from 4 percent to 2.2 percent. He testified that at the time, he also observed ponding in the rear yard of the subject Property, but later clarified that the ponding was within the rear setback (not in the buildable envelope).¹⁸ Elevations indicate that in addition to sloping downhill from west to east, the subject Property slopes downhill from north to south (front to rear). Mr. McFadden testified that he did not observe ponding on any of the other adjoining properties. See Exhibits 36, 52 and 53.

In response to Board suggestions that a lot with a 2 percent slope, or even a 4 percent slope, was still basically a “flat” lot, Mr. McFadden testified that in engineering and in removing water, the implication of even a ½ percent slope could be significant.

Imperviousness of Neighboring “Upstream” Land Uses—Two Pools to the West

Mr. McFadden testified that ponding occurs for a number of reasons, including topography (already discussed), soil conditions, and land use/amount of impervious area. He testified that he looked at the land use to the west of the subject Property, since those properties were at a higher elevation and that was the direction from which water was flowing. He stated that the rear yards of the two lots immediately to the west of the subject Property, at 3706 and 3708 Thornapple Street, have pools with decks. He stated that pools are considered impervious surfaces in Montgomery County, and that these imperviousness rear yard improvements create more storm water runoff, which in turn flows from the higher to the lower elevations. He also testified that these impervious surfaces also cause the storm water to reach the subject Property more quickly because water flows at a greater velocity over an impervious surface than it does over a pervious surface. Finally, he testified that there is a direct relationship between the amount of impervious area and the amount of storm water a property will produce, and that the amount of impervious surface directly influences how much ponding would exist.

Three-Directional Flow and the (Unmaintained) Florida Street Drain

¹⁸ Mrs. Duffy later testified that there is ponding after a commonplace rainfall on the buildable portion of the lot. See Feb. 8 Tr. at page 163. See also Exhibit 56.

Mr. McFadden testified that storm water runoff from three directions is coming together at the rear of the subject Property, and that based on his site visit and the topographical map, he has not seen (has "yet to see") another property in the area where this is the case. He testified that there is runoff coming from the west towards the east (uphill properties with impervious improvements). Based on the elevations of the subject Property, he concluded that water on that Property, in addition to moving from the west to the east, also moves from the north to the south (from the front yard to the rear yard). Mr. McFadden testified that water also flows from the unmaintained Florida Street storm drain in the direction of the subject Property, or south to north. He testified that this drainage structure is antiquated and has not been maintained. He stated that because of the trees in the area and the trees that exist where the drain pipe goes towards the east, in his opinion the only function the storm drain is currently serving is as a storage area for storm water.

Size and Shape of Lot, and Other Factors

Mr. McFadden testified that the impact of the runoff and ponding on the subject Property was greater than the impact would be on a wider lot (e.g. a 50 or 60 foot lot) because the area rendered unusable due to water problems constitutes a larger portion of the Duffy's (smaller) lot. He testified that based on evidence which shows that the Duffy's basement floods (see Exhibit 54), he concluded that the ground water tables in this area are relatively high. He testified that the storage function currently served by the Florida Street drain is adding to the ground water level. He testified that in his opinion, sliding what he described as the impervious footprint of the Duffy's house back seven feet towards the rear of their yard would cause the water table to rise even further. In addition, he testified that moving the house back would increase the imperviousness of the rear of the subject Property, which in turn would increase the rate at which runoff would reach the swale. He further testified that assuming the lot were graded so that half of the water ran towards the front of the lot and half ran towards the rear, sliding the footprint of the house back seven feet towards the rear of the lot would cause a five (5) percent increase in storm water runoff towards the rear of the Property.

Mr. McFadden presented pictorial evidence of the runoff and ponding problems at the subject Property. See Exhibit 56. He stated that these pictures were taken after the type of rainfall that could be expected to occur more than once a year. See Exhibit 55. He testified that in designing drainage facilities, engineers typically design them to accommodate a 10-year storm (i.e. a storm of such magnitude that it could be expected to occur once every ten (10) years). He testified that even if construction were finished and the topsoil replaced, in his opinion there would still be a ponding problem at the rear of the subject Property.

On cross examination, Mr. McFadden suggested several possible solutions for the drainage problems, including regarding the property, adding

landscaping to increase perviousness, installing French or vertical drains, tying into the Florida Street drain, or building a smaller house or a house that did not go back so far into the lot. With respect to the neighbors' pools, Mr. McFadden stated that he did not know if the owners of those pools had taken any steps to alleviate the imperviousness of the pools.

16. Ms. Jane Mayer read her written testimony into the record. She testified that she and her husband, Bill Hamilton, have lived at 3706 Thornapple Street (next door to and west of the subject Property) since January, 2000. She stated that her house is old and nonconforming, and that it violates modern setbacks along the east property line (the property line shared with the Duffys).¹⁹ On cross examination, she stated that her house was set back a maximum of five or six feet (four feet near the chimney) from the side property line that they shared with the Duffys. She also testified on cross examination that there was a concrete "alley," approximately four feet wide, on the side of their house that borders the Duffy's Property. See Exhibit 62. Finally, she testified that her lot is the same depth as the Duffy's lot (125 feet), but slightly wider (possibly 50 feet).

She stated that her house is large, and that she did not originally begrudge the Duffy's their rear addition.

She testified that the original house at 3704 Thornapple Street did not block the light from more than two of the eight east-facing windows on her house. She stated that the Duffy's new house blocks "all eight of the windows on all three stories that form the east side" of her house. She said that her daughter's second floor bedroom window now looked directly into another window,²⁰ and that her master bedroom window similarly has no privacy. She stated that a 35 foot tall structure had replaced a 24 foot structure. She stated that the Duffy's roof overhang leaves their two houses less than six feet apart in places, and that her basement has flooded for the first time in five years.

She testified she had relied on the setbacks required under the Zoning Ordinance to protect her privacy, to guard against the risk of fire spreading,²¹ and to prevent the water from one house's roof from flooding another house's basement. She said that she also thought that the Zoning Ordinance would safeguard the historic value of their house, which she said had been designated an historic landmark by the Montgomery County Historic Preservation Board

¹⁹ It later became apparent that unbeknownst to Ms. Mayer, her property had been granted a variance so that the addition to her house could legally encroach on the east side setback. See Exhibit 61.

²⁰ Mr. Duffy testified on rebuttal the Ms. Mayer's daughter's bedroom window used to look into their (the Duffy's) daughter's bedroom window, and that they took that window out when they replaced the second floor walls (leaving only one window). He further testified that they intentionally did not place windows on the west side of the rear addition, or placed them high in the walls, to allow added privacy for both parties.

²¹ Ms. Mayer acknowledged on cross examination that she had been told by her neighbor Emily Eig that the setbacks were intended to be a safety barrier to guard against the spread of fire.

because it, along with the two houses to the west of it, presented an unmarred streetscape of what Chevy Chase looked like in the 1890s.

She testified that the Duffy's lot is exactly the same size and shape as the lot to the east, and that the lots share common topography. She referred to a 1999 hydrological analysis of section V of Chevy Chase. See Exhibit 57. She testified that 77 percent of the residents surveyed had responded. She stated that 10 percent reported flooding in their yards, 14 percent reported flooding in their houses, and 26 percent reported flooding in both. She said that the survey shows flooding at the subject Property and at 17 of 18 adjacent homes on Thornapple Street. She said that the one home for which flooding was not reported was the Eig home, and that the Eigs have flooding problems but did not complete the survey. On cross examination, she acknowledged that on the same page of the report as the statistics she cited, it said that most of the flooding occurred after a heavy rain or because the ground was saturated after a long period of rain. She conceded that the flooding that Mr. McFadden had spoken about had occurred after a single day of rain, and that she had characterized that rain as not being heavy. Finally, she testified that she had never experienced storm water runoff onto her property from the pool to the west of her property.

Regarding her swimming pool, she testified that it is surrounded by flagstone and bluestone on three sides, and that the fourth side has a cover that is about a foot wide and then grass. She testified that there is landscaping between her house and the pool. Finally, she testified that the pool has a pump to move extra surface water into a drain.

17. Mr. Michael Eig testified that he lives at 3712 Thornapple Street, three doors up from the subject Property. He said that he was the person who filed the complaints that halted the Duffy's construction. He said he called after the Duffys had demolished their old house, and had begun to put their new house up in close proximity to the Mayer-Hamilton's house and forward on the lot.

He testified that he has lived on the street since 1981, and that he has never seen a water problem in the Duffy's back yard, at least not a significant water problem. He stated that he has a much more serious problem at his property. On cross examination, he stated that his house has a widow's walk from which he can look into the Duffy's back yard, but that most of his knowledge regarding water problems at the subject Property came from visiting the prior owners of that Property.

Mr. Eig testified that the Duffy's lot is 125 feet deep, just like all of the other lots on that side of the street. He testified that the Duffy's lot was 42.5 wide, identical to the lot next door (to the east). He testified that the Duffy's lot was not the smallest in the neighborhood, but rather that Mr. Higgins' lot, around the corner (on Dalkeith Street), was in fact the smallest. On cross examination,

he acknowledged that Mr. Higgins' property was not on Thornapple Street. When asked if the Duffy's lot was the smallest lot on Thornapple Street, Mr. Eig replied in the negative, stating that the Duffy's lot was the same size as the lot next door.

With respect to topography, Mr. Eig testified that the Duffy's lot is flat. He introduced a photograph that he says shows the flatness of the yard. See Exhibit 63. He testified that everybody on the street has a serious water problem. Finally, he testified that the rear corner of his property has water flow from three directions. He stated that he and some neighbors had a French drain installed which brings the water off toward "whatever that thing is called on Florida Street"²² On cross examination, he stated that he does not have any topographical maps or photographs to document his assertion that he has water flow from three directions. In response to questioning, he testified that neither his property nor the properties to the west of his have swimming pools, and that while he does have a French drain in his rear yard, there is not a storm drain (like the Florida Street drain) behind his house.

18. Ms. Kristin Gerlach testified that she is the owner of 3700 Thornapple Street, and has lived there for 13 years. She indicated that Fulton Street dead ends behind her house, and that Thornapple Place faces her front yard. She testified that she has had water issues on her property, including ponding after a rain and water in her basement. She stated that water problems are not unique to the street or to her property. She stated that she addressed the water problems at her house with a French drain and sump pump on the inside, and a six foot dry well at the back of the property. She stated that the Florida Street drain in back of the Duffy's property is identical to the drain in the back of her property on Fulton Street,²³ and that in addition to getting water which travels slightly from the yard of her neighbor to the west to her yard, she also gets water from Fulton Street when it rains. Finally, Ms. Gerlach testified that all of the lots on the south side of Thornapple Street are relatively flat.

FINDINGS OF THE BOARD

Preliminary Matter

As a preliminary matter, the Board notes that pursuant to section 59-B-5.3 of the Zoning Ordinance, a one-family dwelling in a residential zone that was built on a lot legally recorded by deed or subdivision plat before June 1, 1958, is not a nonconforming building. As such, the Zoning Ordinance provides that the dwelling:

²² It is unclear from this testimony whether Mr. Eig was referring to the swale or the Florida Street drain.

²³ Mrs. Duffy disagreed with this assessment during her rebuttal, stating that unlike the Florida Street drain, the Fulton Street drain has no catch basin, and that the pipe to it runs along (i.e. parallel to) Ms. Gerlach's property instead of directly towards her property (as the Florida Street drain pipe runs towards the subject Property for a length of 15 feet).

“can be altered, renovated, or enlarged, or replaced by a new dwelling under the zoning development standards in effect when the lot was recorded, except that:

- (a) a lot recorded before March 16, 1928, in the original Maryland-Washington Metropolitan District, must meet the development standards in the 1928 Zoning Ordinance;

* * * * *

- (c) the maximum building height and maximum building coverage in effect when the building is altered, renovated, or enlarged, applies to the building; and
- (d) an established building line setback must conform to the standards for determining the established building line in effect for the lot when any alteration, renovation, or enlargement occurs.”

The Board finds that based on the evidence presented, namely that this Property was platted in 1894 and was created in its current configuration by deeds dated March 19, 1926 and August 27, 1926, this Property fits within the above-cited exemption. See Exhibit 22(a). This Property is thus subject to the development standards set forth in the 1928 Zoning Ordinance, except that the current height and building coverage restrictions apply, and the lot must conform to the established building line setback. The 1928 Zoning Ordinance allows a five (5) foot side setback only for lots that are less than 40 feet in width.

Required Findings Under Section 59-G-3.1

Based upon the Petitioners’ binding testimony and the evidence of record, the Board finds that the variance must be denied. The requested variance does not comply with the applicable standards and requirements of Section 59-G-3.1 as follows:

- (a) *By reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property.*

The Petitioner has failed to show any peculiar, exceptional, or extraordinary condition of the Property that caused a practical difficulty in locating the proposed construction in compliance with the required setbacks.

Testimony Regarding Uniqueness

The Petitioner contends first that the small size and narrowness of the Property are exceptional conditions peculiar to the Property. Petitioner has presented evidence showing that the subject Property, at approximately 5,313 square feet, is the smallest lot on the relevant stretch of Thornapple Street, with the possible exception of the “twin” lot to the immediate east of the subject Property.²⁴ See Exhibit 34.

Indeed, even taking a broader view of the relevant “neighborhood,” the Board acknowledges, based on the Maryland Department of Assessments and Taxation data, that this is one of the three smallest lots in the entire neighborhood of 75 to 100 homes, and that this lot is substandard for the R-60 zone.

In addition, the Petitioner testified that at 42.5 feet wide, there is no lot on the relevant stretch of Thornapple Street that is narrower than the subject Property.²⁵ Indeed, Petitioner presented evidence that even when looking at the broader neighborhood (i.e. including houses on Dalkeith Street, Underwood Street, and Thornapple Place, in addition to those on Thornapple Street), there is no lot that is narrower than his Property. Petitioner contends that this narrow width is a feature unique to his Property.

Finally, the Petitioner presented an expert witness who testified at length that the Property has drainage and ponding problems not found on neighboring lots. Petitioner’s expert asserts that this is due to multiple factors, including a two (2) percent change in grade between the subject Property and the (uphill) lots to the west, the small size of the subject lot, and the existence of contributing factors on surrounding lots such as having two swimming pools located immediately to the west of (uphill from) the subject Property, and the close proximity of an unmaintained and nonfunctional storm drain to the rear of the Property. Petitioner’s expert provided evidence that the rear of the subject Property receives water flow from three directions. See Exhibits 31(a) and 53.

Witnesses for the Opposition testified that the drainage issues at the subject Property are not unique to that Property, but rather are legion in the neighborhood, with two witnesses presenting testimony that they, too, had three-directional flow of water in their rear yards. Testimony from the Petitioner’s expert witness and from Opposition witnesses indicated that there are several different ways to address water problems, including the installation of French or

²⁴ The relevant portion of Thornapple Street, as determined by Petitioners and accepted by the Board, is the three block stretch of that street that extends between Brookeville Road and Connecticut Avenue. As noted earlier, Mr. Duffy has testified that the most recent survey of the subject Property shows that it is actually slightly smaller than the property to the immediate east (5,306 square feet).

²⁵ Again, the Petitioner concedes that the lot to the immediate east is the same width as the subject Property, but his counsel argues that “unique” does not necessarily mean “one of a kind.” Petitioner notes that because the lots on Thornapple Street are rectangular and have a uniform depth of 125 feet, the width of each lot can be calculated by dividing the total square footage of the lot by 125.

vertical drains, tying into the existing drainage system, and regrading or landscaping to change grading and/or increase perviousness.

Testimony Regarding Practical Difficulties or Undue Hardship

Petitioner asserts that the strict application of the established building line setback would cause him either to have to move the existing house back 6.9 feet, or to have to cut off the existing front of the house. He stated that in connection with moving the house (which he testified would be costly), Petitioners would have the practical difficulty of demolishing the 1923 foundation, building a new foundation on all four sides, removing the roof again, and tearing down their lawfully constructed rear addition. He stated that if the house were to be allowed to remain in place, without a variance his porch could only be 2.1 feet deep. In addition, Petitioners' expert witness testified that moving the house seven (7) feet towards the rear of the lot would exacerbate the drainage problems at the rear of the yard by increasing its imperviousness, and by causing an already high water table to rise. Although Petitioners' expert witness testified that the ponding problems on the subject Property were not within the buildable envelope, Petitioner Marianne Duffy testified that there were ponding problems within the buildable envelope after commonplace rainfalls, and cited the February 3, 2006 pictures as proof. See Exhibit 56.

Similarly, Petitioner states that compliance with the required seven (7) foot side setback set forth in the Zoning Ordinance would impose a practical difficulty and undue hardship on him by forcing him to either move the house two feet to the east, cut two feet off of the existing house, or tear the house down and rebuild it. He states that moving his house two feet to the east would cause him to lose use of his driveway, which in turn would deny him vehicular use of the detached rear garage (which he was issued a lawful building permit to reconstruct, and which he and his wife testified are common in the neighborhood). He notes that he is seeking to rebuild his home on the same foundation on which it has existed since 1923 (with a rear addition), and that the total encroachment on the side if the variance were to be granted would be 64 square feet (2 feet x 32 feet (depth of original house)).

The Board's Analysis

In order to approve a variance, the Board must first find that the uniqueness or peculiarity of a property relative to surrounding properties causes the zoning provision to have a disproportionate impact on that property. Cromwell v. Ward, 102 Md. App. 691, 721, 651 A.2d 424 (1995). This requires a finding of a direct "cause-effect" relationship between the peculiar condition of the site and the practical difficulty of which the Petitioner complains.

As the Maryland courts have advised, the "uniqueness" prong of the variance test has a rather specialized meaning:

The “unique” aspect of the variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property. “Uniqueness” of a property for zoning purposes requires that the subject property have an inherent characteristic *not shared by other properties in the area*, i.e. its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restriction imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls.

North v. St. Mary’s County, 99 Md. App. 502, 514, 638 A.2d 1175 (1994)(italics added).

The Board finds that despite the Property’s small size and narrow width, the shape of the Property is regular and rectangular, just like all of the neighboring properties. The Board finds further that undisputed evidence indicates that like all of the neighboring properties on Thornapple Street, this Property is 125 feet deep.

In order to prove that a “practical difficulty” exists, the Petitioners must show that the setback restriction “would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restriction unnecessarily burdensome.” Anderson v. Board of Appeals, Town of Chesapeake Beach, 22 Md. App. 28, 322 A.2d 220 (1974); Red Roof Inns, Inc. v Peoples’ Counsel for Baltimore County, 96 Md. App. 219, 624 A.2d 1281 (1993). It is not enough for an applicant to demonstrate that his or her proposal, if allowed, would be suitable or desirable, would do no harm, or would be convenient for the applicant. See Kennerly v. Mayor of Baltimore, 247 Md. 601, 606-07, 233 A.2d 800 (1967).

Thus despite the Property’s small size and narrow width, given the uniform depth and shape of the subject Property and the neighboring properties, the Board is unable to find that compliance with the frontline setbacks imposed by the established building line would disproportionately impact the subject Property, or that such compliance would impose a practical difficulty or exceptional or undue hardship on this Property. A house can be situated on this rectangular 125 foot deep lot in exactly the same way as it could be situated on any of the neighboring 125 foot deep lots along this street. Indeed, the Petitioners’ site plan (Exhibit 4) indicates that, despite the size and narrowness of the lot, there is still adequate room within the building envelope of the Property to locate the home Petitioners have constructed.

With respect to the side line setback, the Board finds that the 1928 Zoning Ordinance is unusually clear in that it contains a relaxation to five (5) feet of the otherwise applicable seven (7) foot side setback for lots which have a width of 40

feet or less. The Board notes that because this lot is 42.5 feet wide, it falls outside of the lot dimensions for which the Zoning Ordinance says that the required setbacks can be relaxed. Accordingly, since the 1928 Zoning Ordinance states on its face the conditions under which such a reduced setback can be granted and since the subject Property does not meet those conditions, the Board concludes that it cannot grant the requested two (2) foot variance from the required seven (7) foot side setback. Again, the Board notes that a house the width of Petitioners' house could be located on the subject Property in compliance with the side line setbacks without the need for a variance.

The Board rejects Petitioners' contention that the location of the swimming pools and the unmaintained/nonfunctional storm drain on surrounding properties constitute a "practical restriction imposed by abutting properties (such as obstructions) or other similar restrictions" of the type that would render this Property unique under the standard set forth in North. The Board made clear during the hearing that it views drainage and runoff issues as construction issues, not as inherent characteristics which could render a property unique for zoning purposes. The Board finds, after weighing all the evidence in the record, that despite its slight grade, the subject Property is basically a flat lot in a neighborhood of generally flat lots where water problems are not unusual, and that any water problems on the subject Property, regardless of their origin, do not render this Property "unique" for variance purposes, but rather are construction issues that can be addressed through minor improvements such as regrading, landscaping, or the installation of drains, etc.

Petitioners' counsel argues that with respect to structures, the existence of a "party wall" can render a property "unique" as that term is defined by the North and Cromwell cases, and urges the Board to consider the wall between the original house and the rear addition a "party wall." The Board notes that a party wall is a common structural wall between two separately demised premises, and that thus, by definition, a single family dwelling will not encompass a party wall. Hence the Board finds counsel's contention without merit.

With regard to Petitioners' recurring suggestion that the fact that the new construction was on the footprint of the existing foundation justifies that granting of a variance, the Maryland courts have said that the siting of a structure on a lot does not create a zoning justification for the grant of variance. Any practical difficulty must be the result of a unique physical condition of the land and not a result of circumstances relating to the Petitioners' construction activities. See Umerly v. People's Counsel, 108 Md. App. 497, 506 (1996), *citing* North v. St. Mary's County, 99 Md. App. 502, 514 (1994). With regard to any argument that the erroneous issuance of permits by DPS justifies the granting of the requested variances, is clear that the mistake of a county official cannot be the "practical difficulty" unique to the subject Property. Cromwell v. Ward, 102 Md. App. 691, 725, 651 A.2d 424 (1995).

Finally, the Board notes that the courts do not view cost as indicative of hardship in the variance context. While the Board recognizes that installing drainage features and truncating and/or relocating two walls of the house to meet the required setbacks may be a greater financial undertaking than the Petitioners would encounter if they were allowed to retain the placement of the house on the existing foundation, the Board notes that it may not take the cost of this work into consideration. "Hardship is not demonstrated by economic loss alone. It must be tied to the special circumstances [of the land], none of which have been proven here. Every person requesting a variance can indicate some economic loss. To allow a variance anytime any economic loss is alleged would make a mockery of the zoning program." Cromwell v. Ward, 102 Md. App. at 715, *quoting* Xanthos v. Board of Adjustment, 685 P.2d 1032, 1036-37 (Utah 1984).

"It follows that the unnecessary hardship . . . must relate to the land, not to the applicant-owner. Hardship which is merely personal to the current owner of real property will not justify the granting of a variance Reviewing a wide variety of variance applications based upon reasons personal to the applicant, the courts have consistently held that such personal difficulties do not constitute unnecessary hardship." 3 Robert M. Anderson, *American Law of Zoning* § 18.30 (2d ed.)

In this case, we find that any practical difficulty in complying with the setback requirements of the Zoning Ordinance is personal to the Petitioners and does not relate to the land itself. As stated above, the siting of a structure on a lot does not create a zoning justification for the grant of variance. See Umerly v. People's Counsel, 108 Md. App. 497, 506 (1996), *citing* North v. St. Mary's County, 99 Md. App. 502, 514 (1994).

Thus the Board finds that the Petitioners have failed to show that any peculiar, exceptional, or extraordinary condition of the Property has caused a "practical difficulty" in locating their house in compliance with the required setbacks. Consequently, the petition does not meet the requirements of Section 59-G-3.1(a). The Board did not consider the other requirements in that section for the grant of a variance.

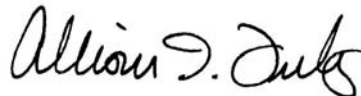
Accordingly, on March 1, 2006, the Board voted to deny the originally requested variances of 6.9 feet from the established front building line of 32.30 feet, in accordance with section 59-C-1.323(a), for the construction of a new dwelling that is set back 25.40 feet from the front lot line, and 6.9 feet from the established front building line, in accordance with section 59-B-3.1, for the construction of a covered porch that is set back 16.4 feet from the front lot line,. On a motion by Member Angelo M. Caputo, seconded by Vice Chair Donna L. Baron, with Board Chair Allison I. Fultz, Member Wendell M. Holloway, and Member Caryn L. Hines, in agreement, the Board adopted the foregoing

Resolution. Pursuant to the June 7, 2006 hearing on the revised building permit denial and attendant corrections to the extent of the variances needed in light of the revised established building line calculation, the requested variance of 1.70 feet from the established front building line of 27.10 feet, in accordance with section 59-C-1.323(a), for the construction of a new dwelling that is set back 25.40 feet from the front lot line, is denied, and that portion of the previously referenced Resolution which denied a variance of 6.9 feet in accordance with that same section 59-C-1.323(a) is rendered null. On a motion by Vice Chair Donna L. Barron, seconded by Member Caryn L. Hines, with Board Chair Allison I. Fultz, Member Wendell M. Holloway, and Member Angelo M. Caputo in agreement, the Board adopted the foregoing Resolution.

Accordingly, the requested variance of a variance of two (2) feet for the construction of a new dwelling that is within five (5) feet of the side lot line where the required setback is seven (7) feet, in accordance with section 59-C-1.323(a), is denied. On a motion by Vice Chair Donna L. Barron, seconded by Board Chair Allison I. Fultz, with Member Wendell M. Holloway in agreement, and Member Angelo M. Caputo and Member Caryn L. Hines not in agreement, the Board adopted the foregoing Resolution.

The Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the Opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.



Allison Ishihara Fultz, Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 29th day of August, 2006.

Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County on accordance with the Maryland Rules of Procedure.